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MEGAT NOOR ISHAK MEGAT IBRAHIM

v.

DR HARI KRISHNAN & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S8-22-523-2000]
3 MAY 2007

C

CIVIL PROCEDURE: *Pre-trial case management - Directions and orders - Expert reports - Application for disclosure of expert medical reports - Whether disclosure prevented by legal professional privilege - Rules of the High Court 1980, O. 34 r. 4(2)(f) - Evidence Act 1950, s. 126*

D

EVIDENCE: *Expert evidence - Expert reports - Application for disclosure of expert medical reports - Whether privileged - Burden of proof to establish privilege - Whether solicitor had become acquainted with expert report in course of his professional employment - Evidence Act 1950, s. 126*

E

EVIDENCE: *Expert evidence - Expert witness - Whether expert witness who does not produce expert report may be precluded from giving evidence at trial*

F

EVIDENCE: *Privilege - Legal professional privilege - Scope of privilege - Application by plaintiff for defendant to disclose expert medical reports - Solicitor not named as respondent - Whether legal professional privilege applicable - Evidence Act 1950, s. 126*

G

The plaintiff brought this action against the defendants for professional negligence in connection with an eye operation carried out by the 1st and 2nd defendants on the plaintiff's right eye at the 3rd defendant's hospital. After the operation, the plaintiff's right eye became permanently blind. The plaintiff alleged that the blindness to his right eye was due to the negligence of the 1st and 2nd defendants when carrying out the operation. The plaintiff made this application pursuant to O. 34 r. 4(2)(f) and (k) of the Rules of the

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High Court 1980 for *inter alia* the following orders: (i) that the parties serve on one another their expert report(s) within 14 days; and (ii) that each party is at liberty at the trial to call his/its expert witness(es) whose report has been disclosed. The defendants opposed this application on the grounds that a report of an expert

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is by itself a privilege communication by virtue of s. 126 of the Evidence Act 1950 ('the Act').

Held (allowing the application with cost in the cause):

(1) The report of an expert is not by itself a privilege document within the ambit of s. 126. The report of an expert is governed by ss. 45 and 46 of the Act and there is nothing in the provisions to suggest that expert reports are by themselves privilege communications governed by s. 126. (para 9)

(2) The legal burden was on the defendants to satisfy the court that such report was a privilege document by reason of s. 126. In order to discharge that burden, there must be an affidavit by the counsel/solicitor to the effect that he had become acquainted with the expert report in the course of his professional employment. There must also be affidavit evidence by the solicitor/advocate concerned or by the defendants themselves, that the defendants do not consent to the disclosure of the report. No such affidavit was filed. (para 10)

(3) Section 126 imposes a prohibition on solicitors/counsel and not on the defendants themselves. Therefore, s. 126 was irrelevant in the present application because the application was directed at the defendants themselves, and not at their solicitors/counsel. Section 126 would only be relevant if the application had named a solicitor/counsel as the respondent and the prayers directed at the named solicitor/counsel to disclose the expert report. (para 12)

(4) It was not fair to preclude the defendants from calling an expert witness at the trial to give evidence orally where there was no intention on the part of the expert witness to refer to any expert report. (para 19)

Legislation referred to:
Evidence Act 1950, ss. 45, 46, 126
Rules of the High Court 1980, O. 34 rr. 2(j), 4(2)(f), (k)

For the plaintiff - June Tan; M/s Skrine
For the 1st & 2nd defendants - PS Ranjan (MS Dhillon with him); M/s PS Ranjan & Co
For the 3rd defendant - S Kanagasabapathy; M/s Kanaga & Suresh

Reported by Amutha Suppayah

JUDGMENT

Hishamudin Mohd Yunus J:

[1] Encl. 36 is an interlocutory application (summons in chambers) by the plaintiff for the following orders:

(a) that the plaintiff and the defendants serve on one another his/its expert report (or reports) within 14 days of the service of this order; and

(b) that each party is at liberty at the trial to call his/its expert witness (or witnesses); provided that the expert witness (or witnesses) to be called is only confined to that expert (or those experts) whose report has been disclosed pursuant to this order.

(c) that costs of the application be borne by the 1st and 2nd defendants.

[2] The present suit is an action by the plaintiff against the defendants for professional negligence in connection with an eye operation (retinal detachment operation) carried out by the 1st and 2nd defendants on the plaintiff's right eye at the Tun Hussein Onn National Eye Hospital (the 3rd defendant) in 1999. The operation was performed by the 1st defendant, with the 2nd defendant being the anesthetist. After the operation, the plaintiff's right eye became permanently blind. The plaintiff alleges that the blindness to his right eye was due to the negligence of the 1st and 2nd defendants when carrying out the operations. The plaintiff alleges that the 3rd defendant is vicariously liable in respect of the tort of negligence of the 1st and 2nd defendants.

[3] This application at encl. 36 is made pursuant to O. 34 r. 4(2)(f) and (k) of the Rules of the High Court 1980. Subrule (2)(f) states:

> (2) Without prejudice to the generality of the provision of paragraph (1), the Judge may:
>
> (f) order either party to the action to furnish the report of an expert and fix the time for the delivery of such report;
>
> ...
>
> (k) limit the number of witnesses that each party to the action may call at the trial.

[4] I granted the application (with costs in the cause) as it is clear to me that the application is fair and reasonable and in accordance with the above paras. (f) and (k) of the above sub-r. (2).

[5] The 1st and 2nd defendants oppose this application. However, they did not file any affidavit.

[6] The 3rd defendant takes a neutral stand as it does not have any expert report. However, the 3rd defendant asks for costs against the plaintiff, regardless whether the plaintiff succeeds or not in this application. Like the 1st and 2nd defendants, the 3rd defendant too did not file any affidavit.

[7] I see no merit in the 1st and 2nd defendants' argument in opposing this application at encl. 36.

[8] The first ground advanced for opposing this application is that a report of an expert is by itself a privilege communication by virtue of s. 126 of the Evidence Act 1950. Section 126 stipulates as follows:

> Professional communications.
>
> 126. (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure:
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

[9] With respect, I am unable to accept the argument that the report of an expert is by itself a privilege document within the ambit of s. 126 and cannot be disclosed at the trial (except with the permission of the defendants). The report of an expert is governed by ss. 45 and 46 of the Evidence Act and there is nothing in these provisions to suggest that expert reports are by themselves privilege communications governed by s. 126.

[10] In my opinion, if the 1st and 2nd defendants claim that the expert report in their possession is a privilege document by reason of s. 126 and that they do not propose to disclose it to the court, by reason of it being a privilege document, then, the legal burden is on the 1st and 2nd defendants to satisfy the court that such report is a privilege document by reason of s. 126. In order to discharge that burden, there must be an affidavit by the counsel/solicitor in the employment of the 1st and 2nd defendants to the effect that he has become acquainted with the expert report in the course of his professional employment. In addition to that there must affidavit evidence by the solicitor/advocate concerned that his clients (namely, the 1st and 2nd defendants), or by the 1st and 2nd defendants themselves, that the clients (ie, the 1st and 2nd defendants) do not consent to the disclosure of the report. But in the present application, as I have earlier said, no such affidavit has been filed by the 1st and 2nd defendants or by their solicitor. With respect I do not think it suffices for the learned counsel for the 1st and 2nd defendants merely to assert from the bar (by way of a written submission) that the expert report in their possession is a privilege document by reason of s. 126. If the intention of the drafters of the Evidence Act that an expert report is by itself deemed to be a privileged document by virtue of s. 126 then ss. 126, 45 and 46 would not have been worded the way they are presently worded. If expert reports by themselves are inherently or deemed to be privilege documents, I think the Evidence Act will say so explicitly.

[11] Secondly, it is to be observed that in the present case the plaintiff's application is for the defendants themselves to furnish the expert report (or reports). The application is not directed at the defendants' solicitors or advocates/counsel. Now, bearing this in mind, let us examine the provisions of s. 126. If we were to examine the provisions of s. 126 we will appreciate that the section begins with the words:

> No advocate shall at any time be permitted

[12] What do these words mean? In my opinion, what these words mean is that, firstly, s. 126 imposes a prohibition rather that conferring a privilege on any one. Secondly, that prohibition is imposed on solicitors/counsel: the prohibition is not imposed on the defendants themselves. Thirdly, the prohibition is not an absolute prohibition in the sense that the document in question may still be disclosed to the court by the solicitor/counsel in question provided the solicitor/counsel has obtained the permission of his client. In my view, if s. 126 is viewed in this perspective, then s. 126 is

irrelevant for the purpose of opposing the present application; because the summons in chambers at encl. 36 is directed at the defendants themselves, and not at their solicitors/counsel. The summons in chambers is not asking for the court to order the defendants' solicitors/counsel to disclose the expert report (or reports). Nowhere are the defendants' solicitors/counsel mentioned in the prayers in the summons in chambers. It is the defendants themselves who are the respondents in the summons in chambers; not their solicitors/counsel. Section 126 would only be relevant if the present application has named a solicitor/counsel (for example the defendants' solicitors/counsel) as the respondent and that the prayers are directed at the named solicitor/counsel to disclose the expert report. In the present case, for the 1st and 2nd defendants to plead privilege and to cite s. 126, in opposing the plaintiff's application, is to throw in a red herring.

[13] In any case, as I understand it, the present application is not intended to prevent the defendants from claiming privilege (I shall go along for the moment using the word 'privilege' rather than 'prohibition' since the learned counsel for the 1st and 2nd defendants has preferred to use the word 'privilege') under s. 126, assuming for the moment that s. 126 confers on the 1st and 2nd defendants such a privilege. In other words, if the defendants do not wish to furnish to the plaintiff any expert report on grounds of privilege, they may do so. There is no compulsion. However, the point of the plaintiff's application is this: the defendants cannot later, at the trial, change their mind, waived the so-called privilege, and insist on relying on the expert report by calling the maker (ie, the expert). Such a move would not be fair to the plaintiff. Such a move would make a mockery of pre-trial discovery and case management. In other words s. 126 cannot be used by a party as a tactical manoeuvre to launch a surprise on his opponent.

[14] In the present application, there is nothing to prevent the defendants from saying to the plaintiff:

> We claim privilege under section 126 of the Evidence Act and do not intend to adduce any expert report at the trial or to call the maker of the report (ie, the expert in question).

[15] I do not think that the plaintiff would have complained (or be aggrieved) to such a response from the defendants, since the defendants have made it clear to the plaintiff that they do not intend to call any expert or to tender any expert report at the trial.

[16] Further, in the present case, I am unable to accept the contention by the 1st and 2nd defendants that O. 34 r. 4(2)(f) is *ultra vires* the Evidence Act. I am not convinced that O. 34 r. 4(2)(f) is *ultra vires* the Evidence Act. Order 34 r. 2(j) provides:

> (j) subject to all just exceptions as to privilege, direct the parties to make any disclosure or provides any information which the Judge considers relevant to the issues in the action;

[17] Thus it is clear from the scheme of O. 34 r. 2 that there is no intention to override provisions of law pertaining to privilege.

[18] Now, having said all the above, upon reflection, I think I ought not to have granted prayer (b) of the application exactly in the manner prayed. It will be recalled that prayer (b) reads:

> (b) supaya Plaintif dan Defendan-Defendan diberi kebebasan memanggil saksi-saksi pakar, terhad kepada mana-mana saksi yang laporannya telah didedahkan;

[19] It will be observed that prayer/relief (b), if literally interpreted, means that parties are only allowed to call experts as witnesses at the trial only those experts who have disclosed their expert reports at the case management stage pursuant to the present encl. 36. Now, the question arises: what if later, at the trial, the 1st and 2nd defendants intend to call an expert witness who has not prepared any expert report who, in giving evidence, does not intend to refer to any expert report? If the 1st and 2nd defendants do not intend to disclose any expert report by reason of the so-called privilege, I do not think that it is fair to preclude the 1st and 2nd defendants from calling an expert witness at the trial to give evidence orally, where there is no intention on the part of the expert witness to refer to any expert report. Upon reflection, when granting prayer (b), I ought not to have made it too restrictive. In other words, upon reflection, I ought to have added the words:

> dan juga kepada mana-mana saksi pakar yang tidak berhasrat untuk merujuk kepada mana-mana laporan pakar (kecuali laporan pakar yang telah didedahkan) semasa memberi keterangan.

[20] in prayer/relief (b) so that it will then read:

> (b) supaya Plaintif dan Defendan-Defendan diberi kebebasan memanggil saksi-saksi pakar, terhad kepada mana-mana saksi yang laporannya telah didedahkan dan juga kepada mana-mana saksi pakar yang tidak berhasrat untuk merujuk kepada mana-mana laporan pakar (kecuali laporan pakar yang telah didedahkan) semasa memberi keterangan.